

SUPREME COURT NO: 20110211
Grand Forks County No: 18-09-C-01665

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Gary A. Hangsleben, on behalf of the heirs at law
of Delores M. Hangsleben,

Plaintiff/Appellant,

vs.

Gail R. Halverson, Russell Halverson, Justin Halverson, Matt Halverson, Dr.
Larry O. Halvorson, Dr. Robin T. Hape, Valley Eldercare Center – Valley
Memorial Homes, Good Samaritan Heritage Grove, Altru Health System,

Defendants/Appellees.

**BRIEF OF APPELLEES DR. LARRY O. HALVORSON,
DR. ROBIN T. HAPE, AND ALTRU HEALTH SYSTEM**

**Appeal of the Judgment of Dismissal With Prejudice Dated and
Entered June 7, 2011, by the District Court in Grand Forks County,
Northeast Central Judicial District, the Honorable Debbie G. Kleven
Presiding**

Randall S. Hanson, ND ID# 04876
Donna M. Smith, ND ID# 06241
CAMRUD, MADDOCK, OLSON
& LARSON, LTD.
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206-5849
Phone: (701) 775-5595
Fax: (701) 772-3743
Email: rhanson@camrudlaw.com
dsmith@camrudlaw.com

TABLE OF CONTENTS

Page No., Paragraph No.

Table of Contents p. i

Table of Authorities p. iii

Statement of the Issues p. 1

I. Whether the District Court erred in granting the Motion for Dismissal of Defendants Dr. Halvorson, Dr. Hape and Altru Health System based on Plaintiff’s failure to comply with the mandates of N.D.C.C. § 28-01-46 (2005) p. 1

A. Standard of review p. 1

B. Whether N.D.C.C. § 28-01-46 is applicable to Plaintiff’s claims against these Defendants, and/or whether Plaintiff’s Complaint includes any claims against these Defendants which are outside the scope of N.D.C.C. § 28-01-46..... p. 1

C. Whether any exception to the requirement of serving a supporting expert opinion, as enumerated in N.D.C.C. § 28-01-46, is applicable to Plaintiff’s claims against these Defendants p. 1

D. Whether good cause was shown by the Plaintiff for an extension of time in which to serve an admissible expert opinion supporting Plaintiff’s medical negligence claims against these Defendants p. 1

II. Whether Plaintiff is precluded from raising the issue of constitutionality of N.D.C.C. § 28-01-46 for the reason that he did not raise that issue in the District Court proceedings p. 1

Statement of the Case ¶ 1

Statement of the Facts ¶ 6

Law and Argument	¶ 18
I. Whether the District Court erred in granting the Motion for Dismissal of Defendants Dr. Halvorson, Dr. Hape and Altru Health System based on Plaintiff’s failure to comply with the mandates of N.D.C.C. § 28-01-46 (2005)	¶ 18
A. Standard of review	¶ 18
B. Whether N.D.C.C. § 28-01-46 is applicable to Plaintiff’s claims against these Defendants, and/or whether Plaintiff’s Complaint includes any claims against these Defendants which are outside the scope of N.D.C.C. § 28-01-46.....	¶ 21
C. Whether any exception to the requirement of serving a supporting expert opinion, as enumerated in N.D.C.C. § 28-01-46, is applicable to Plaintiff’s claims against these Defendants	¶ 26
D. Whether good cause was shown by the Plaintiff for an extension of time in which to serve an admissible expert opinion supporting Plaintiff’s medical negligence claims against these Defendants	¶ 31
II. Whether Plaintiff is precluded from raising the issue of constitutionality of N.D.C.C. § 28-01-46 for the reason that he did not raise that issue in the District Court proceedings	¶ 39
Conclusion	¶ 43

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph No.</u>
<u>Ballensky v. Flattum-Riemers,</u> 2006 ND 127, 716 N.W. 2d 110	18
<u>Clark v. Clark,</u> 2006 ND 182, 721 N.W.2d 6	19
<u>Evanstad v. Buchholz,</u> 1997 ND 141, 567 N.W. 2d 194, 196	34
<u>Flatt ex rel. Flatt v. Kantak,</u> 2004 ND 173, 687 N.W.2d 208	19
<u>Greenwood, Greenwood & Greenwood v. Klem,</u> 450 N.W.2d 745 (N.D. 1990)	34
<u>Hanson v. Williams County,</u> 452 N.W.2d 313 (N.D. 1990)	40
<u>Haugenoe v. Bambrick,</u> 2003 ND 92, 663 N.W.2d 175, 179	18, 22, 29
<u>Larsen v. Zarrett,</u> 498 N.W.2d 191 (N.D. 1993)	29
<u>Larson v. Hetland,</u> 1999 ND 98, 593 N.W.2d 785	18
<u>Production Credit Ass'n of Grafton v. Davidson,</u> 444 N.W.2d 339 (ND 1989).....	34
<u>Scheer v. Altru Health System,</u> 2007 ND 104, 734 N.W.2d 778	18, 32
<u>So. Valley Grain Dealers v. Bd. of Cty. Com'rs,</u> 257 N.W.2d 425 (N.D.1977)	41
<u>State v. Foster,</u> 1997 ND 8, 560 N.W.2d 194	19

State v. Tweed,
491 N.W.2d 412 (N.D. 1992)..... 40, 41

Wisdom v. State of North Dakota ex rel. ND Real Estate Commission,
403 N.W.2d 19 (N.D. 1987) 41

Rules and Statutes

N.D.C.C. § 28-01-46 passim

N.D.R. App. P. 44 40

STATEMENT OF THE ISSUES

- I. Whether the District Court erred in granting the Motion for Dismissal of Defendants Dr. Halvorson, Dr. Hape and Altru Health System based on Plaintiff's failure to comply with the mandates of N.D.C.C. § 28-01-46 (2005)
 - A. Standard of review
 - B. Whether N.D.C.C. § 28-01-46 is applicable to Plaintiff's claims against these Defendants, and/or whether Plaintiff's Complaint includes any claims against these Defendants which are outside the scope of N.D.C.C. § 28-01-46
 - C. Whether any exception to the requirement of serving a supporting expert opinion, as enumerated in N.D.C.C. § 28-01-46, is applicable to Plaintiff's claims against these Defendants
 - D. Whether good cause was shown by the Plaintiff for an extension of time in which to serve an admissible expert opinion supporting Plaintiff's medical negligence claims against these Defendants
- II. Whether Plaintiff is precluded from raising the issue of constitutionality of N.D.C.C. § 28-01-46 for the reason that he did not raise that issue in the District Court proceedings

STATEMENT OF THE CASE

[1] This is an appeal from a Judgment of Dismissal With Prejudice dismissing the Plaintiff's Complaint in its entirety following separate motions for dismissal and/or summary judgment by individual groups of defendants, all of which were ultimately granted in favor of the defendants. See Judgment of Dismissal with Prejudice, App. at p. 80.

[2] Plaintiff commenced the underlying action in September 2009, alleging negligence on the part of his sister, Gail R. Halverson, her husband Russell Halverson, and their sons Justin and Matt Halverson (“Halversons”), and medical negligence on the part of Dr. Larry Halvorson, Dr. Robin Hape, and Altru Health System (“Altru Defendants”); Valley Eldercare Center – Valley Memorial Homes (“VMH”); and Good Samaritan Heritage Grove (“Good Samaritan”). See Complaint, generally, App. at pp. 13-18. Plaintiff alleged that Defendants’ negligence resulted in the death of his mother, Delores Hangsleben, for which he claimed wrongful death damages on behalf of the heirs of the decedent. Id.

[3] In December 2009, the Altru Defendants moved for their individual dismissal based on Plaintiff’s failure to serve an admissible expert opinion supporting his claims as required under N.D.C.C. § 28-01-46. See Defendants Dr. Halvorson, Dr. Hape and Altru Health System’s Notice of Motion and Motion for Dismissal, App. at pp. 26-27. VMH filed a similar motion in January 2010. Following hearing on the motions, the trial court determined that § 28-01-46 applied to the claims against the moving Defendants, that Plaintiff had failed to comply with the statute, that no good cause to extend the deadline for an expert affidavit existed, that no exception to the requirements of § 28-01-46 had been shown, and that the Altru Defendants and VMH must be dismissed under the statute. See Order Granting Motion for Dismissal of Dr. Larry Halverson, Dr. Robin Hape, Altru Health System, and Valley Eldercare Center - Valley Memorial

Homes, App. at. pp. 41:5-23; 42:1-23. A Judgment of Dismissal of the Altru Defendants was entered on April 15, 2010. See Judgment of Dismissal (Dr. Halvorson, Dr. Hape, Altru Health System), Appellees' App. at. p. 42. Judgment of Dismissal of VMH was entered on April 27, 2010. See Judgment of Dismissal (Valley Eldercare Center – Valley Memorial Homes), Appellees' App. at. p. 45.

[4] Defendant Good Samaritan then moved for summary judgment under N.D.C.C. § 28-01-46 in March 2010, which was granted by the Court and judgment entered May 26, 2010. See Judgment of Dismissal (Good Samaritan Heritage Grove), Doc ID# 58. In July 2010, the remaining Halverson Defendants moved for summary judgment on the grounds that the Plaintiff lacked standing to bring a survival action or wrongful death action relative to his mother's death. See Defendants Gail Halverson, Russell Halverson, Justin Halverson and Matt Halverson's Joint Motion for Summary Judgment of Dismissal and Notice of Motion, Doc ID# 62. The Court ruled that Plaintiff did lack standing to pursue a survival claim, but was qualified to bring a wrongful death action, even though he would not be entitled to any recovery (having been intentionally disinherited by his mother). See Order Granting in Part and Denying in Part Motion to Dismiss of Defendants Gail R. Halverson, Russell Halverson, Justin Halverson and Matt Halverson, App. at pp. 45-50.

[5] The Halversons moved for summary judgment of the remainder of the claim in March 2011, asserting that Plaintiff had failed to produce any evidence to

support his wrongful death claim and that the undisputed facts showed that Delores Hangsleben died of natural causes. See Motion for Summary Judgment of Dismissal and Notice of Motion (Amended), Doc ID# 101. The Court found that there was no issue of material fact in this regard and granted the Halversons' motion. See Order Granting Defendants Gail R. Halverson, Russell Halverson, Justin Halverson and Matt Halverson's Motion for Summary Judgment, and Order Denying Motion to Compel, App. at pp. 63-66. Thereafter, a Judgment of Dismissal With Prejudice was entered on June 7, 2011. See Judgment of Dismissal with Prejudice, App. at p. 80. The Judgment stated that it was "dismissing the complaint of the plaintiff against said defendants [Gail R. Halverson, Russell Halverson, Justin Halverson and Matt Halverson] in its entirety with prejudice, and having previously dismissed the complaint of the Plaintiff against Defendants Dr. Larry O. Halvorson, Dr. Robin T. Hape, Valley Eldercare Center – Valley Memorial Homes, Good Samaritan Heritage Grove, and Altru Health Center." Id. This appeal by the Plaintiff followed with a Notice of Appeal dated and filed July 20, 2011. See Notice of Appeal, App. at p. 81. These Altru Defendants note that neither the Notice of Appeal nor the District Court's Notice of Filing the Notice of Appeal were served on them and they were unaware of the appeal, and subsequent remand to dispose of the Halversons' remaining counterclaim, until receipt of Appellant's Brief Supporting Appeal of Summary Judgment on November 29, 2011. The District Court's Notice of Filing the Notice of Appeal indicates that it was mailed only to the Clerk of the Supreme Court,

Plaintiff Gary Hangsleben, and Donald Leonard, attorney for the Halvorson Defendants. See Notice of Filing the Notice of Appeal, App. at. p. 82.

STATEMENT OF THE FACTS

[6] At some point in 2007, Delores Hangsleben moved from her personal residence to the Good Samaritan Heritage Grove facility in East Grand Forks, MN. See Complaint, App. at p. 14, ¶¶ 5-6. In September of 2007, Mrs. Hangsleben was moved to Valley Eldercare Center – Valley Memorial Homes in Grand Forks, ND. See [VMH’s] Brief in Support of Motion for Dismissal Under N.D.C.C. 28-01-46, or Alternatively, Motion for Summary Judgment, at p. 2, Doc ID# 40.

[7] On January 21, 2008, Mrs. Hangsleben was transferred from VMH to Altru Hospital in Grand Forks, ND, for evaluation of severe abdominal pain. See Complaint, App. at p. 14, ¶ 6. The Altru medical records reflect that at the time of admission, Mrs. Hangsleben was a very frail 82 year old, with a history of multiple sclerosis, hypertension, chronic obstructive pulmonary disease, stroke with residual right-sided hemiparesis, osteoporosis, vertebral stress fracture and severe kyphosis. See Decedent’s Medical Records, Appellees’ App. at pp. 52-60, 62; Affidavit of Robin T. Hape, M.D., Doc ID# 89; Affidavit of Larry O. Halvorson, M.D., Doc ID# 90. During her hospitalization, Mrs. Hangsleben was examined by Dr. Larry Halvorson and general surgeon Dr. Robin Hape. See Decedent’s Medical Records, Appellees’ App. at pp. 56-60. Their diagnosis was acute gangrenous cholecystitis (inflammation of the gallbladder with dead or

dying tissue), and the treatment options offered to her included surgical cholecystectomy (removal of the gallbladder) or the placement of a cholecystostomy tube (less invasive treatment by placement of a tube). Id.; Complaint, App. at p. 15, ¶ 7. As the medical records reflect, and Drs. Halvorson and Hape further attested in their Affidavits attached to the Halverson Defendants' Brief in Support of Motion for Summary Judgment of Dismissal, Mrs. Hangsleben adamantly refused surgical intervention and desired to receive comfort measures only by pain medication. See Decedent's Medical Records, Appellees' App. at pp. 59-62; Altru Hospital Report of Delores M. Hangsleben, January 23, 2008, App. at 114-116; Affidavit of Robin T. Hape, MD., Doc ID# 89; Affidavit of Larry O. Halvorson, M.D., Doc ID# 90. The doctors further noted in their medical notes and Affidavits that the patient was mentally clear and alert at the time of their consultations with her regarding treatment and that they observed no indication that her medical decisions were the result of any coercion, pressure or undue influence by others. Id.

[8] Delores Hangsleben received medical care according to her wishes at Altru. Id. She expired on January 23, 2008. See Death Certificate of Delores M. Hangsleben, January 23, 2008, App. at 113. The Death Certificate for Mrs. Hangsleben indicated the cause of death as acute gangrenous cholecystitis, with the only contributing factor noted being multiple sclerosis. Id. Mrs. Hangsleben, a widow, was survived by her two adult children, the Plaintiff Gary Hangsleben, and Gail Halverson, one of the named Defendants. Gary Hangsleben had been

expressly and purposefully disinherited by his mother in her Last Will and Testament executed in February of 1988. See [VMH's] Brief in Support of Motion for Dismissal under N.D.C.C. 28-01-46, or, Alternatively, Motion for Summary Judgment and Exhibit 1, Doc ID# 40. The Will designated Gail Halverson as Delores Hangsleben's personal representative (id.), and she has been duly appointed as personal representative of her mother's estate. See Brief of Appellees Halverson, at p. 2.

[9] Plaintiff commenced his suit against the Defendants in September 2009, with service of the Summons and Complaint effected on the Altru Defendants September 8, 2009. See Affidavit of Personal Service (Dr. Robin Hape), Doc ID# 5; Affidavit of Personal Service (Altru Hospital), Doc ID# 6; Affidavit of Personal Service (Dr. Larry Halvorson), Doc ID# 12. As referenced above, Plaintiff's Complaint claimed medical negligence on the part of the Altru Defendants, VMH and Good Samaritan, alleging the Defendants "failed to take appropriate and prudent actions to protect Delores Hangsleben," "fail[ed] to properly instruct, train, and supervise," "fail[ed] to provide proper medical care and medication as needed," and other acts of negligence, resulting in the death of his mother. See Complaint, App. at pp. 16-17, ¶¶ 10-12.

[10] These Altru Defendants served a Notice of Appearance on September 10, 2009, and an Answer on September 25, 2009. See Separate Answer of Defendants Dr. Larry Halvorson, Dr. Robin Hape and Altru Health System, Appellees' App.

at pp. 1-8. In their Answer, these Defendants denied that Dr. Halvorson, Dr. Hape, or any employee or agent of Altru Health System acted below the appropriate standard of care in their treatment of Delores Hangsleben and denied that any action or inaction of these Defendants was the proximate cause of Delores Hangsleben's death. Id.

[11] The other defendants served their Answers to the Complaint and some written discovery was conducted in the next few months, including interrogatories seeking information regarding the details of Plaintiff's negligence claims and his intended expert witnesses for trial. See [VMH's] Brief in Support of Motion for Dismissal under NDCC 28-01-46, or Alternatively, Motion for Summary Judgment, Doc ID# 40. At no time in the three months following commencement of his suit did the Plaintiff provide any information whatsoever regarding any expert opinion supporting his allegations of medical negligence in his Complaint. See Brief in Support of Defendants Dr. Halvorson, Dr. Hape, and Altru Health System's Motion for Dismissal, App. at pp. 29-30; Affidavit of Randall S. Hanson, App. at pp. 34-35; [VMH's] Brief in Support of Motion for Dismissal under NDCC 28-01-46, or Alternatively, Motion for Summary Judgment, Doc ID# 40; Defendant Good Samaritan Heritage Grove's Motion to Dismiss under N.D.C.C. 28-01-46 or, in the Alternative, for Summary Judgment and Supporting Brief, Doc ID# 46.

[12] Since this action was commenced against the Altru Defendants with personal service on September 8, 2009, Plaintiff's deadline for serving a supporting expert affidavit was December 8, 2009. On December 30, 2009, the Altru Defendants served and filed their Motion for Dismissal on the grounds that Plaintiff had failed to serve an expert affidavit supporting a *prima facie* case of medical negligence within three months of commencement of the action as required by N.D.C.C. § 28-01-46. See Defendants Dr. Halvorson, Dr. Hape, and Altru Health System's Notice of Motion and Motion for Dismissal, App. at pp. 26-27. In addition, the Defendants noted that Plaintiff had not requested or been granted an extension for providing the required affidavit. See Brief in Support of Defendants Dr. Halvorson, Dr. Hape, and Altru Health System's Motion for Dismissal, App. at pp. 29-30; Affidavit of Randall S. Hanson, App. at pp. 34-35.

[13] As noted above, Defendant VMH brought a similar motion and hearing on both motions was set for February 22, 2010. The Plaintiff did not serve or file any written opposition or other response to either of the pending motions prior to the hearing, but did appear at the hearing to offer oral argument. See Transcript of Proceedings, Motion Hearing, February 22, 2010, Appellees' App. at p. 18:18-25; Order Granting Motion for Dismissal of Dr. Larry Halvorson, Dr. Robin Hape, Altru Health System, and Valley Eldercare Center – Valley Memorial Homes, App. at p. 39:21-22. At the hearing, the Plaintiff argued that good cause existed for the Court to grant him an extension of time in which to provide an expert

affidavit in support of his medical negligence claims. Id. at pp. 35:6-10, 37:9-12. First, the Plaintiff contended that he believed he had until the October 15, 2010, deadline for Plaintiff's expert disclosure indicated in the Court's Scheduling Order. Id. at pp. 19:12-22, 29:16-25; 30:1-3. Plaintiff also stated that he had fired his legal counsel and was looking for replacement counsel to represent him in the matter. Id. at pp. 25:7-11, 26:5-25, 27:1-25, 28:1-2, 32:8-25; 33:1-21. Finally, Plaintiff argued that the exception in N.D.C.C. § 28-01-46 relating to unintentional failure to remove a foreign substance applied, thereby negating the requirement of producing a supporting expert affidavit. Id. at pp. 19:23-25, 20:1-2, 34:7-25, 35:1-5.

[14] On April 6, 2010, Judge Kleven issued her Order granting the motions for dismissal of the Altru Defendants and VMH. See Order Granting Motion for Dismissal of Dr. Larry Halvorson, Dr. Robin Hape, Altru Health System, and Valley Eldercare Center – Valley Memorial Homes, App. at p. 38-44. The Court held that N.D.C.C. § 28-01-46 specifically provides that the expert affidavit requirement applies to hospitals, physicians, nurses and nursing facilities and thus applied to the moving Defendants. Id. at pp. 40:21-23, 41:1-4. The Order stated that the Plaintiff had until December 8, 2009, to serve an expert affidavit on the moving Defendants, and that he had not done so, despite Defendants' repeated requests and reminders of the necessity of such an affidavit. Id. at p. 41:5-8. The Court additionally noted that the Plaintiff had refused to identify any expert who could provide a supporting affidavit at the motion hearing, and had still not

provided such an affidavit by the date the Court issued its Order. Id. at p. 41:8-12.

The Court noted that no party had received a request by the Plaintiff for an extension of time for obtaining an expert opinion. Id. at p. 41:11-14.

[15] The trial court found that Plaintiff's argument relating to the expert disclosure deadline in the Scheduling Order was without merit, in that the scheduling deadline had nothing to do with the statutory requirements of § 28-01-46 for maintaining a medical negligence claim. Id. at 41:18-21. The Court also rejected Plaintiff's oral request for an extension to provide the expert affidavit, finding that Plaintiff's claim of ineffective assistance of counsel was meritless and was not good cause for such an extension. Id. at p. 41:22-23, 42:1-10. The Court found that the record did not reflect that Plaintiff was ever represented by counsel and that the Plaintiff had, in fact, specifically advised the Court at the January 2010 scheduling conference that he was proceeding *pro se*. Id. at p. 42:3-9.

[16] The Court also found no merit in Plaintiff's assertion that N.D.C.C. § 28-01-46 does not apply to the instant claims because of the exception for "unintentional failure to remove a foreign substance from within the body of a patient." Id. at pp. 42:11-23, 43:1. The Court found nothing in the pleadings to suggest Defendants unintentionally left a foreign object in the body, and in fact, Plaintiff's Complaint specifically stated that Delores Hangsleben received no surgery in her medical treatment. Id. The Court indicated it found no exception to

N.D.C.C. § 28-01-46 had been shown by the Plaintiff and ordered Plaintiff's claims against the Altru Defendants and VMH be dismissed. Id.

[17] In accordance with the Court's findings and Order discussed above, Judgments of Dismissal were entered in favor of the Altru Defendants and VMH on April 15, 2010, and April 27, 2010, respectively. See Judgment of Dismissal (Dr. Halvorson, Dr. Hape, Altru Health System), Appellees' App. at p. 42; Judgment of Dismissal (Valley Eldercare Center – Valley Memorial Homes), Appellees' App. at p. 45. Defendant Good Samaritan was dismissed on similar grounds on May 26, 2010. See Judgment of Dismissal (Good Samaritan Heritage Grove), Doc ID# 58. The Halverson Defendants were dismissed via separate motions based on lack of standing and, in essence, failure to make – or demonstrate the ability to make – a *prima facie* showing of causation, with a Judgment of Partial Dismissal entered on October 21, 2010, and final Judgment of Dismissal entered on June 7, 2011. See Judgment of Partial Dismissal, Doc ID# 66; Judgment of Dismissal with Prejudice, App. at p. 80. The June 7, 2011, Judgment stated that it was “dismissing the complaint of the plaintiff against said defendants [Gail R. Halverson, Russell Halverson, Justin Halverson and Matt Halverson] in its entirety with prejudice, and having previously dismissed the complaint of the Plaintiff against Defendants Dr. Larry O. Halvorson, Dr. Robin T. Hape, Valley Eldercare Center – Valley Memorial Homes, Good Samaritan Heritage Grove, and Altru Health Center.” Id.

LAW AND ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED IN GRANTING THE MOTION FOR DISMISSAL OF DEFENDANTS DR. HALVORSON, DR. HAPE AND ALTRU HEALTH SYSTEM BASED ON PLAINTIFF'S FAILURE TO COMPLY WITH THE MANDATES OF N.D.C.C. § 28-01-46 (2005)

A. Standard of Review

[18] The issues presented for appeal potentially involve two different standards of review. De novo review applies to the Court's interpretation of N.D.C.C. § 28-01-46 to determine whether the statute applies to the Plaintiff's actions against the Altru Defendants and whether dismissal of such claims was required under the statute. Statutory interpretation is a question of law, fully reviewable on appeal. Scheer v. Altru Health System, 2007 ND 104 ¶16, 734 N.W.2d 778 (citing Ballensky v. Flattum-Riemers, 2006 ND 127, 716 N.W. 2d 110. However, in cases similar to the one at bar, where the plaintiff has not met the requirements of the statute as a matter of law, this Court has declined to address the appropriate standard of review. See Haugenoe v. Bambrick, 2003 ND 92, ¶ 9, 663 N.W.2d 175; Larson v. Hetland, 1999 ND 98, ¶ 13 n. 2, 593 N.W.2d 785.

[19] Abuse of discretion is the standard of review applicable to the Court's consideration of whether the Plaintiff had shown good cause for an extension to provide the required expert affidavit. The trial court has discretion to determine whether a plaintiff has met his burden of showing good cause. N.D.C.C. § 28-01-46. The sound discretion of the court is the proper standard to be applied on the

question whether or not good cause existed for an extension and an appellate court will not reverse such a decision except in stances where the trial judge abused his discretion. State v. Foster, 1997 ND 8, ¶ 6, 560 N.W.2d 194. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process. Clark v. Clark, 2006 ND 182, ¶ 7, 721 N.W.2d 6; Flatt ex rel. Flatt v. Kantak, 2004 ND 173, ¶ 15, 687 N.W.2d 208.

[20] Here, the Court properly determined that N.D.C.C. § 28-01-46 applied to the Plaintiff's claims against the Altru Defendants; that no exception to the statute was applicable; and that Plaintiff had not shown good cause for an extension to provide the required affidavit. Altru Defendants respectfully request the Court to affirm the decision of the district court, dismissing Plaintiff's Complaint against these Defendants.

B. Whether N.D.C.C. § 28-01-46 is Applicable to Plaintiff's Claims Against These Defendants, and/or Whether Plaintiff's Complaint Includes Any Claims Against These Defendants Which are Outside the Scope of N.D.C.C. § 28-01-46

[21] N.D.C.C. § 28-01-46, as it existed at the time of accrual of Plaintiff's purported cause of action, states:

Any action for injury or death alleging professional negligence by a physician, nurse, hospital, or nursing, basic, or assisted living facility licensed by this state or by any other health care organization, including an ambulatory surgery center or group of physicians operating a clinic or outpatient care facility, must be dismissed without prejudice on motion unless the plaintiff serves upon the

defendant an affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action. The court may set a later date for serving the affidavit for good cause shown by the plaintiff. The expert's affidavit must identify the name and business address of the expert, indicate the expert's field of expertise, and contain a brief summary of the basis for the expert's opinion. This section does not apply to unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence.

N.D.C.C. § 28-01-46 (2005).

[22] To support a claim of medical negligence, the plaintiff must establish through his expert the applicable standard of care, violation of that standard, and a causal relationship between the violation and the harm complained of. Haugenoe, 2003 ND 92, ¶ 11. The purpose of § 28-01-46 is to minimize frivolous claims by requiring the plaintiff to produce an expert opinion to support the allegations of negligence in the early stages of litigation. Id. at ¶ 10. The failure of the Plaintiff to provide the required affidavit mandates dismissal of Plaintiff's claims.

N.D.C.C. ¶ 28-01-46.

[23] There is no dispute that as physicians and a hospital and its staff, Dr. Halvorson, Dr. Hape, and Altru Health System are all within the categories of professionals expressly designated in § 28-01-46. All of Plaintiff's claims against these Defendants pertain to the hospitalization of Delores Hangsleben at Altru Hospital and care provided by Altru physicians and staff from January 21 to January 23, 2008. See Complaint, App. at pp. 13-17, ¶¶ 2, 6-13. Specifically,

Plaintiff alleged that with respect to their care of the patient during that hospitalization, these Defendants “failed to take appropriate and prudent actions to protect Delores Hangsleben,” “fail[ed] to properly instruct, train, and supervise,” “fail[ed] to provide proper medical care and medication as needed,” and “fail[ed] to implement a safe plan for Delores Hangsleben’s recovery.” *Id.* at ¶¶ 10-12.

The Complaint alleged that this negligence of the Defendants resulted in the death of Delores Hangsleben. *Id.* The Complaint contained no other causes of action or claims against the Altru Defendants unrelated to their professional medical care and treatment of Mrs. Hangsleben. *Id.*, generally. At the hearing on the Defendants’ motions to dismiss, counsel for the Altru Defendants explained that the relationship between Mrs. Hangsleben and Defendants Dr. Hape, Dr. Halvorson, and Altru Health System was limited entirely to the medical care provided to Mrs. Hangsleben. *See* Transcript of Proceedings, Motion Hearing, February 22, 2010, Appellees’ App. at pp. 23:20-25, 24:1-8.

[24] The trial court found no other causes of action against Defendants Dr. Halvorson, Dr. Hape, and Altru Health System, except in their professional care of Mrs. Hangsleben, and correctly concluded that N.D.C.C. § 28-01-46 clearly applies to all of Plaintiff’s claims against the Altru Defendants. *See* Order Granting Motion for Dismissal of Dr. Larry Halvorson, Dr. Robin Hape, Altru Health System, and Valley Eldercare Center – Valley Memorial Homes, App. at pp. 40:21-23, 41:1-4.

[25] In his appeal brief, Plaintiff did not identify any other claims against the Altru Defendants that would fall outside N.D.C.C. § 28-01-46. See Appellant’s Brief Supporting Appeal, generally. In fact, Plaintiff has not appealed the applicability of the statute to his claims against these Defendants. Reviewing this issue de novo on the entire record before the Court, the Court should easily conclude that N.D.C.C. § 28-01-46 applies to all of Plaintiff’s claims against the Altru Defendants.

C. Whether any Exception to the Requirement of Serving a Supporting Expert Opinion, as Enumerated in N.D.C.C. § 28-01-46, is Applicable to Plaintiff’s Claims Against These Defendants

[26] The statute at issue contains an exception to the requirement of a supporting expert affidavit in cases of “unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence.” N.D.C.C. § 28-01-46. At the hearing on these Defendants’ motion for dismissal and again in his appellate brief, Plaintiff asserted this exception as a defense to his not serving an expert affidavit. See Transcript of Proceedings, Motion Hearing, February 22, 2010, Appellees’ App. at pp. 19:23-25, 20:1-2, 34:7-25, 35:1-5; Appellant’s Brief Supporting Appeal, p. 13, ¶ 1.

[27] However, Plaintiff provided no evidence in support of his position at the motion hearing or in his appellate brief. Id. Plaintiff did not allege that Delores

Hangsleben underwent any surgery or other invasive procedure during which a foreign substance could have been left in her body. Id.; Complaint, App. at pp. 15-16, ¶ 9. In fact, Plaintiff’s central allegation of negligence against the Altru Defendants is that they did not perform any surgery or other procedure to treat his mother’s gangrenous gallbladder. Id. Her medical records confirm that, according to Mrs. Hangsleben’s wishes, there were no surgeries or other invasive procedures performed at Altru. See Decedent’s Medical Records, Appellees’ App. at pp. 56-62; Altru Hospital Report of Delores M. Hangsleben, January 23, 2008, App. at pp. 114-116; Affidavit of Robin T. Hape, MD., Doc ID# 89; Affidavit of Larry O. Halvorson, M.D., Doc ID# 90. The trial court agreed that nothing in Plaintiff’s Complaint could be construed to allege the unintentional leaving of a foreign object in his mother’s body as “the Complaint alleges that, while at the hospital, Delores ‘received no antibiotics, no surgery, or tube inserted to help with [sic] infected gallbladder’ emphasis’ (emphasis added).” See Order Granting Motion for Dismissal of Dr. Larry Halvorson, Dr. Robin Hape, Altru Health System, and Valley Eldercare Center – Valley Memorial Homes, App. at p. 42:15-21. The trial court also found nothing in the Complaint or the Plaintiff’s argument that shows a layperson could easily discern that Mrs. Hangsleben’s death was caused by the alleged negligence of any of the Defendants. Id.

[28] Plaintiff continues to maintain that the “obvious occurrence” exception applies, arguing that an infected gangrenous gallbladder, which he alleges contributed to his mother’s death, was obvious and could be observed by a

layperson. See Appellant’s Brief Supporting Appeal, p. 13, ¶ 1. However, Plaintiff offers nothing but his opinion to support his allegation. Id. Plaintiff has provided no case law or other support. Id. Further, Plaintiff is confusing his mother’s medical *condition* with the medical *negligence* which must be obvious in order for the exception to apply. In addition, these Defendants dispute that a gangrenous gallbladder can be observed by a layperson, or even a physician for that matter, as the diagnosis was made based on a CT study of the patient’s abdomen and other lab tests. See Decedent’s Medical Records, Appellees’ App. at p. 56.

[29] The obvious occurrence exception provides that expert testimony is not required “to establish a duty, the breach of which is a blunder so egregious that a layman is capable of comprehending its enormity. Haugenoe, 2003 ND 92, ¶ 10, (citing Larsen v. Zarrett, 498 N.W.2d 191, 192 (N.D. 1993)). The Haugenoe Court further explained that technical procedures are recognized as being beyond the understanding of a layperson. Id. at ¶ 11.

[30] Defendants assert that the issue here is beyond the understanding of a layperson. To prove a case of medical negligence in this situation, the Plaintiff must show that the Defendants were somehow negligent by following the wishes of their patient, a frail, but mentally clear 82-year old with significant health concerns, who determined that she did not wish to be subjected to further treatment. This is not an issue that is within the understanding of a layperson. A

layperson would not have the skills, experience, or training necessary to determine the appropriate course of action. Expert physician testimony would be required to set forth the standard of care for a physician in such a situation; to determine if there was a breach of that standard of care; and whether any damages were proximately caused by the breach. Success on the element of causation alone requires an expert who can opine to a reasonable degree of medical certainty a different course of medical treatment would have had a different result. There can be no doubt that such technical medical issues are beyond the understanding of lay people. The trial court correctly found that the obvious occurrence exception did not apply to the facts of this case.

D. Whether Good Cause was Shown by the Plaintiff for an Extension of Time in Which to Serve an Admissible Expert Opinion Supporting Plaintiff’s Medical Negligence Claims Against These Defendants

[31] Section 28-01-46 allows for expansion of the three-month time period for serving an expert affidavit, if good cause is shown. N.D.C.C. § 28-01-46 (“[t]he court may set a later date for serving the affidavit for good cause shown by the plaintiff.”). Dismissal of the Complaint is mandated if the plaintiff fails to show good cause for an extension. Id. Plaintiff maintains that he did show good cause for needing a three-month extension of his deadline in order to find replacement legal counsel, as his original legal counsel had not adequately represented him and “the heirs.” See Appellant’s Brief Supporting Appeal, p. 13, ¶ 1.

[32] The North Dakota Supreme Court has not defined what circumstances constitute good cause for an extension under N.D.C.C. § 28-01-46, but have instead left that determination, along with the ultimate decision whether to grant the requested extension, to the discretion of the trial court. Scheer, 2007 ND 104, ¶ 24. In this case, even though Plaintiff did not properly move the trial court for an extension, Judge Kleven gave reasoned and considerable thought to Plaintiff's request.

[33] Plaintiff's request for an extension was first advanced at the February 2010 hearing on the motion to dismiss of the Altru Defendants and VMH. See Transcript of Proceedings, Motion Hearing, February 22, 2010, Appellees' App. at pp. 26:6-16. Plaintiff claimed that he had retained a law firm to represent him in this case but later dismissed the firm. Id. at p. 26:17-20. However, the Court noted that nothing in the record indicated that the Plaintiff was ever represented by anyone other than himself, and that he had, in fact, explicitly stated to the court at the previous hearing that he was proceeding *pro se*. Id. at pp. 26:21-25, 27:1-7. The Plaintiff further acknowledged that he had nothing in writing to indicate that any attorney or firm had agreed to represent him in this matter. Id. at pp. 27:18-25, 28:1-2. Counsel for each of the Defendants additionally confirmed to the Court that none of them had received any communication from any attorney indicating they were representing Mr. Hangsleben in this matter. Id. at pp. 27: 5-12, 28:23-25, 29:1-3.

[34] As referenced above, at the February 2010 hearing the Plaintiff also claimed that he believed he had until the October 15, 2010, deadline in the Court's Scheduling Order to disclose his expert witnesses. Id. pp. 29:6-25, 30:1-3. At that time he suggested that his lack of knowledge of the law bolstered his argument for good cause for an extension of his expert affidavit deadline under N.D.C.C. § 28-01-46. Id. at p. 35:6-10. However, it is well established in this state that statutes and rules will not be modified or applied differently merely because a party not learned in the law is acting *pro se*. Evanstad v. Buchholz, 1997 ND 141, ¶ 8, 567 N.W. 2d 194, 196; Greenwood, Greenwood & Greenwood v. Klem, 450 N.W.2d 745, 747 (N.D. 1990); Production Credit Ass'n of Grafton v. Davidson, 444 N.W.2d 339, 341 (ND 1989). Plaintiff had a duty to research and follow the applicable laws and rules when litigating his action without representation by counsel. Regardless of any such duty, Plaintiff was affirmatively made aware of the requirements of § 28-01-46 through Defendants' repeated requests and reminders of the necessity of an expert affidavit. See Order Granting Motion for Dismissal of Dr. Larry Halvorson, Dr. Robin Hape, Altru Health System, and Valley Eldercare Center – Valley Memorial Homes, App. at p. 41: 7-14. Plaintiff was also advised of the necessity of producing an expert affidavit when the Defendants served their motion for dismissal on December 30, 2009, yet Plaintiff did not produce an expert affidavit nor request an extension to do so prior to the February 22, 2010, hearing. See Brief in Support of Defendants Dr. Halvorson, Dr. Hape and Altru Health System's Motion for Dismissal, App. at pp. 31-33;

Affidavit of Randall S. Hanson, App. at pp. 34-35; Order Granting Motion for Dismissal of Dr. Larry Halvorson, Dr. Robin Hape, Altru Health System, and Valley Eldercare Center – Valley Memorial Homes, App. at p. 41:7-14.

[35] The trial court appropriately applied its discretion when determining that the Plaintiff had not shown good cause for an extension. The Court considered all of Plaintiff's arguments and provided a reasoned decision for denying the request. The Court's decision was not arbitrary, unreasonable or unconscionable, and therefore, must be affirmed.

[36] In his present appeal, Plaintiff simply states he had shown good cause for a three-month extension of the deadline. See Appellant's Brief Supporting Appeal, p. 13, ¶ 1. As the original deadline under the statute was December 8, 2009, a three-month extension would have given him until March 8, 2010. However, the record shows that on March 30, 2010, Defendant Good Samaritan brought a motion to dismiss or alternatively, motion for summary judgment, under § 28-01-46 for Plaintiff's failure to serve an expert affidavit supporting his claims against Good Samaritan in the then over six months time since commencing his suit. See Defendant Good Samaritan Heritage Grove's Motion to Dismiss under N.D.C.C. 28-01-46 or, in the Alternative, for Summary Judgment and Supporting Brief, Doc ID# 46. Plaintiff did not respond to the Defendant Good Samaritan's motion, which Defendants consider acknowledgement that he still had not procured a supporting expert opinion in the case, even though Plaintiff been instructed by the

Court at the February 22, 2010, hearing, that he was required to do so. See Transcript of Proceedings, Motion Hearing, February 22, 2010, Appellees' App. at pp. 29:21-25, 30:1-3.

[37] Defendants would further point out that the case remained pending against the Halversons and that the October 15, 2010, the deadline for Plaintiff's disclosure of expert witnesses came to pass with no expert witness ever disclosed by the Plaintiff. [Halversons'] Motion for Summary Judgment of Dismissal and Notice of Motion (Amended), App. at p. 60, ¶ 2. According to the Halversons' motion papers, Plaintiff had advised the Court at the January 10, 2011, Pretrial Conference that he would not be utilizing any expert witnesses in the case. Id. at ¶ 2. Indeed, Plaintiff provided no medical expert opinion or other competent admissible evidence to rebut the medical evidence produced by the Halversons, including medical records, death certificate, and affidavits of two physicians indicating that Mrs. Hangsleben died of natural causes. See Order Granting Defendants Gail R. Halverson, Russell Halverson, Justin Halverson and Matt Halverson's Motion for Summary Judgment, and Order Denying Motion to Compel, App. at 65:10-18.

[38] There is nothing in the record of the extensive proceedings in the District Court to indicate that Plaintiff ever retained legal counsel to represent him in this matter or retained any expert to support his medical negligence claims or establish medical causation for the death Delores Hangsleben. Plaintiff's professed need for

an extension of time in providing an expert affidavit under N.D.C.C. § 28-01-46 is not borne out by the record and he has not shown good cause for being afforded such an extension.

II. WHETHER PLAINTIFF IS PRECLUDED FROM RAISING THE ISSUE OF CONSTITUTIONALITY OF N.D.C.C. § 28-01-46 FOR THE REASON THAT HE DID NOT RAISE THAT ISSUE IN THE DISTRICT COURT PROCEEDINGS

[39] Appellant's Brief Supporting Appeal of Summary Judgment asks this Court to address the issue of whether N.D.C.C. § 28-01-46 is unconstitutional, apparently on the basis that the law is, or may be, discriminatory in that it requires a plaintiff to provide an expert affidavit only in malpractice actions against health care professionals such as doctors, hospitals, nursing homes and medical clinics. See Appellant's Brief Supporting Appeal, Statement of Issues, ¶ 5, and Law and Argument, ¶ 5. Plaintiff makes no further argument as to why this issue should be considered at this time.

[40] The issue of constitutionality of § 28-01-46 is not properly before the Court for several reasons. First, the issue of constitutionality was not raised in the trial court. It is a well-established principle in this state that issues not raised below cannot be raised for the first time on appeal. State v. Tweed, 491 N.W.2d 412, 417 (N.D. 1992); Hanson v. Williams County, 452 N.W.2d 313, 315 (N.D. 1990). The North Dakota Court has further advised that this principle applies with particular force to a constitutional issue. Hanson, 452 N.W.2d at 315. In addition,

Plaintiff has not indicated that he gave notice to the Attorney General that he is contesting the constitutionality of the statute, as required by Rule 44 of the North Dakota Rules of Appellate Procedure. See N.D.R. App. P. 44.

[41] Even if consideration of the issue were proper on appeal, the Plaintiff has not provided any support for his position. It is well accepted that a litigant faces a substantial burden in refuting the constitutionality of a statute, as constitutionality is conclusively presumed absent a clear showing that the statute contravenes the state or federal constitution (see e.g., Tweed, 491 N.W.2d at 418). In the Wisdom case, the North Dakota Court found that the appellant had not advanced any persuasive authority or reasoning for challenging the constitutionality of a statutory provision and stated, “our consideration of a suggested constitutional issue is guided by Justice Vogel's familiar stricture that ‘[o]ne who attacks a statute on constitutional grounds . . . should bring up his heavy artillery or forego the attack entirely.’” Wisdom v. State of North Dakota ex rel. ND Real Estate Commission, 403 N.W.2d 19, 22 (N.D. 1987) (quoting So. Valley Grain Dealers v. Bd. of Cty. Com'rs, 257 N.W.2d 425, 434 (N.D.1977)).

[42] These Defendants assert that Plaintiff's attempted challenge of the constitutionality of N.D.C.C. § 28-01-46 in his appeal is insufficient and untimely and should not be given any consideration by this Court.

CONCLUSION

[43] The trial court correctly determined that the Plaintiff's failure to produce a supporting expert affidavit required dismissal of his medical negligence claims against these Defendants pursuant to N.D.C.C. § 28-01-46. These Altru Defendants respectfully request that the Court affirm the trial court's June 7, 2011 Judgment of Dismissal With Prejudice dismissing Plaintiff's Complaint in its entirety, including these Defendants' individual interlocutory Judgment of Dismissal of April 15, 2010.

RESPECTFULLY SUBMITTED this 11th day of January, 2012.

s/ Donna M. Smith

RANDALL S. HANSON, ND ID# 04876

DONNA M. SMITH, ND ID# 06241

For: Camrud, Maddock, Olson, & Larson, Ltd.
401 Demers Avenue, Suite 500
P.O. Box 5849

Grand Forks, ND 58206 5849

Telephone: (701) 775-5595

Facsimile: (701) 772-3743

Email: rhanson@camrudlaw.com

dsmith@camrudlaw.com

*Attorneys for Defendants/Appellees Dr. Larry
O. Halvorson, Dr. Robin T. Hape, and Altru
Health System*

SUPREME COURT NO: 20110211
Grand Forks County No: 18-09-C-01665

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Gary A. Hangsleben, on behalf of the heirs at law
of Delores M. Hangsleben,

Plaintiff/Appellant,

vs.

Gail R. Halverson, Russell Halverson, Justin Halverson, Matt Halverson, Dr.
Larry O. Halvorson, Dr. Robin T. Hape, Valley Eldercare Center – Valley
Memorial Homes, Good Samaritan Heritage Grove, Altru Health System,

Defendants/Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2012, the following documents:

**Brief of Appellees Dr. Larry O. Halvorson, Dr. Robin T. Hape, and
Altru Health System; and**

**Joint Appendix of Appellees Dr. Larry Halvorson, Dr. Robin T. Hape,
Altru Health System and Valley Eldercare Center – Valley Memorial
Homes**

were filed electronically with the North Dakota Supreme Court Clerk at:

SupClerkofCourt@ndcourts.gov

I further certify that a copy of the foregoing documents will be mailed by first
class mail, postage paid, to the following:

Gary A. Hangsleben
Pro Se Litigant
P.O. Box 14222
Grand Forks, ND 58208

Donald H. Leonard
Attorney at Law
MASSEE & LEONARD, LTD.
308 DeMers Avenue NW
East Grand Forks, MN 56721

and that the below counsel for Defendants/Appellees were served electronically at:

Robert J. Udland
Leslie Bakken Oliver

rudland@vogellaw.com
loliver@vogellaw.com

s/ Donna M. Smith

RANDALL S. HANSON, ND ID#04876
DONNA M. SMITH, ND ID#06241
For: Camrud, Maddock, Olson & Larson, Ltd.
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206 5849
Phone: (701) 775-5595
Fax: (701) 772-3743
Email: dsmith@camrudlaw.com